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No. 15-606

In the Supreme Court of the United States

MIGUEL ANGEL PEÑA-RODRIGUEZ,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF IN OPPOSITION FOR THE STATE OF COLORADO

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QUESTION PRESENTED

Like its Federal counterpart, Colorado's "no-impeachment" rule excludes juror testimony regarding what was said during deliberations when offered to challenge the validity of a verdict. Colo. R. Evid. 606(b); *see also* Fed. R. Evid. 606(b). Last term, in *Warger v. Shauers*, 135 S. Ct. 521 (2014), this Court held that application of a no-impeachment rule to exclude evidence of juror bias does not violate the Sixth Amendment right to an impartial jury

The question presented is:

Does the Sixth Amendment grant a defendant the right to override the no-impeachment rule and challenge his criminal conviction based on allegations that racially biased statements were made by one juror during jury deliberations?

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STATEMENT OF THE CASE

Colorado's no-impeachment rule provides that, with limited exceptions not applicable here, jurors may not testify as to statements made during deliberations if those statements will be used to challenge the validity of a verdict: "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations ...." Colo. R. Evid. 606(b).[1] The Rule prohibits not only live testimony, but also affidavits or other evidence by a juror. *Id.*

This Rule, like its federal counterpart, "precludes courts from peering beyond the veil that shrouds jury deliberations." Pet. App. 6a; *see also Yeager v. United States*, 557 U.S. 110, 122 (2009) ("The jury's deliberations are secret and not subject to outside examination."). Colorado's Rule is "broad in scope" and has three fundamental purposes: "promot[ing] finality of verdicts, shield[ing] verdicts from impeachment, and protect[ing] jurors from harassment and coercion." Pet. App. 6a–7a (quoting *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005)).

In two key cases, this Court has rejected attempts to impose constitutional exceptions to no-impeachment rules. First, in *Tanner v. United States*, this Court

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[1] The exceptions to the Rule are that juror testimony is allowed as to "(1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form." Colo. R. Evid. 606(b). Although Petitioner claimed in the courts below that the first exception applies in this case, he does not advance that argument here.

upheld the Federal no-impeachment rule with respect to a juror's allegations of intoxication and drug use by members of the jury. 483 U.S. 107, 115–16 (1987). The Court emphasized the "long-recognized and very substantial concerns [that] support the protection of jury deliberations from intrusive inquiry." *Id.* at 127 It concluded that even where a no-impeachment rule bars evidence of juror activity during deliberations, a defendant's Sixth Amendment rights are "protected by several aspects of the trial process." *Id.* Those include: (1) voir dire; (2) observation of the jury during trial by the court, counsel, and court personnel; (3) reports of misconduct by jurors before they render a verdict; and (4) nonjuror evidence of misconduct.

Second, last term in *Warger v. Shauers*, the Court unanimously declined to limit *Tanner*'s holding to juror competency, extending it to cases of juror bias. With respect to alleged bias revealed during deliberations, the Court held "that [Federal] Rule 606(b) applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied [about her bias] during voir dire." 135 S. Ct. at 525. The Court declined to find the no-impeachment rule unconstitutional, reaffirming the sufficiency of the *Tanner* safeguards in cases of alleged juror bias. *Id.* at 529. Although the no-impeachment rule "remov[ed] one means of ensuring that jurors are unbiased," the Court emphasized that jury voir dire is "an essential means of protecting this right [to an impartial jury]" and that "juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." *Id.* In a footnote, the Court noted that "extreme cases"

of bias may undermine the *Tanner* safeguards. *Id.* at 529 n.3. But the Court declined to address that issue or qualify its holding that claims of juror bias do not override the no-impeachment rule.

Here, Petitioner invites the Court to depart from its longstanding jurisprudence and begin creating constitutional exceptions to the no-impeachment rule.

Factual background. Miguel Peña-Rodriguez was born in Mexico and moved to the United States as a child. R. 755.[2] In May 2007, he was living and working as a horse keeper at the Arapahoe Race Track in Colorado. *Id.* at 501–02. Three sisters—ages 16, 15, and 14—were also staying at the racetrack, with their parents, in a room at the opposite end of the barn from Peña-Rodriguez. *Id.* at 367, 446–47, 461, 504–05, 514.

While the three girls were walking to a racetrack bathroom one evening, two men were talking and drinking beer near the bathroom entrance. *Id.* at 376–77, 449, 453–54. The girls knew one of the men as "Hugo." *Id.* at 377, 449. After the girls went into the bathroom, the man who had been talking to Hugo entered and asked if the girls wanted to "drink or party," to which they said no. *Id.* at 377–78. One of the girls left the bathroom immediately, and the other two told the man to leave. *Id.* at 379, 402–03. Instead, he turned off the lights and grabbed the girls. *Id.* at 379–80, 469. One girl felt his hands on her lower back and buttocks, while the other felt his hand on her right shoulder, moving down toward her breast before she was able to push it off. *Id.* at 469, 472, 489. After a

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[2] The transcripts of the hearings and the trial are contained in a single PDF file. Citations are to the PDF pagination.

struggle, the girls freed themselves and left the bathroom. *Id.* at 382–83.

The girls told their parents what had happened, describing the assailant as the man who had been with Hugo and who was staying at the other end of the barn. *Id.* at 384, 419. Their dad immediately knew they were talking about Peña-Rodriguez and ran to the other side of the barn to try to find him. *Id.* at 506, 517. Unable to find him, the girls' father informed the racetrack security guard of the incident. While speaking to the guard, he saw Peña-Rodriguez speeding away in his pickup truck. *Id.* at 508–11.

Based on information provided by the girls and their father, police located and arrested Peña-Rodriguez later that night. He admitted that he had drunk "four or five beers in the last four hours," and during separate one-on-one showups,[3] the two girls identified—with certainty—Peña-Rodriguez as the man who had entered the bathroom. *Id.* at 385–88, 429, 477–78, 574.

Trial. Peña-Rodriguez was charged in state court with felony attempted sexual assault and with three misdemeanors: one count of unlawful sexual contact and two counts of harassment. PR., Vol. 1, p. 63. Prior to voir dire, the judge told defense counsel that "in the past, some of our jurors have been vocal in their dislike of people who aren't in the country legally. So I don't know if that's an issue for you or your client, but you

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[3] The showups were conducted on a roadside inside the race track. Each victim was separately brought to the scene and made the identification from inside a police car, with Peña-Rodriguez standing by his truck with lights illuminating the area. R. 574.

may want to address it." R. 191. During voir dire, however, defense counsel did not mention race, national origin, or immigration status; nor did he ask any questions about the prospective jurors' views on or experiences with race. R. 307–320; Pet. App. 36a.

During the trial, defense counsel did not challenge the evidence establishing that a sex crime had been committed or that the assailant was a Hispanic male. Instead, the defense told the jury that "this is a case about misidentification" and focused on whether Peña-Rodriguez was properly identified as the assailant. R. 357 The two victims took the stand and identified Peña-Rodriguez as the man who had entered the bathroom and whom they had identified during the on-site identification. *Id.* at 378–79, 450, 454, 467, 475–76. Peña-Rodriguez exercised his right not to testify; he presented a single alibi witness, a friend and co-worker who claimed that Peña-Rodriguez had been visiting him in a different nearby stable during the time of the assault. *Id.* at 603–06, 610–11, 613.

During closing arguments, the defense did not deny that a Hispanic male had assaulted the girls, but instead focused almost exclusively on challenging the identification evidence. Specifically, defense counsel highlighted apparent inconsistencies in the victims' descriptions of the specifics of the crime and the assailant's clothing, the police's failure to take fingerprints from the bathroom light switch, and the prosecution's failure to produce Hugo as a witness. *Id.* at 638–55.

The case went to the jury, which at one point during deliberations sent the court a note saying only "The jury is hung, Judge." *Id.* at 673. The court encouraged

the jurors to continue to attempt to reach a verdict. *Id.* at 675–76. Later that afternoon, the jury sent a note explaining that they had reached verdicts on three of the four charges, but could not reach a verdict on the fourth. *Id.* at 676. After approximately 12 total hours of deliberation, the jury remained unable to reach a verdict on the felony attempted sexual assault count but returned guilty verdicts on the three misdemeanor counts. *Id.* at 682–83. The court imposed a two-year supervised probation sentence. *Id.* at 767, 773.

Juror affidavits and post-verdict proceedings. Two of the jurors spoke with defense counsel after trial, alleging that Juror 11 had made statements during deliberations that evidenced racial bias. As part of a motion for a new trial, defense counsel prepared and submitted affidavits from the two jurors.

The first affidavit said that Juror 11 "made the following statement concerning the Defendant: 'I think he did it because he's Mexican and Mexican men take whatever they want.'" PR. Vol. 1, p. 249. The affidavit also asserted that Juror 11 "made other statements concerning Mexican men being physically controlling of women because they have a sense of entitlement and think they can 'do whatever they want' with women." *Id.*

The second affidavit paraphrased Juror 11 as having said, among other things, that "[h]e believed that the defendant was guilty because in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." *Id.* at 251.

Neither affidavit asserted that any other jurors agreed with or responded to Juror 11's alleged statements or that they had any effect on the deliberations or verdict.

Defense counsel argued that these affidavits entitled Peña-Rodriguez to a new trial because they showed Juror 11 had deliberately concealed his bias during voir dire. While acknowledging that Rule 606(b) prohibits the use of juror affidavits, counsel argued that the "extraneous prejudicial information" exception applied. The trial court denied the motion, concluding that there was no evidence that Juror 11 had concealed his alleged bias since no direct inquiry into racial bias was made during voir dire. R. 714–15, 723–26.

Appellate Proceedings. On appeal, Peña-Rodriguez challenged his conviction on several grounds, including by arguing for the first time that application of Rule 606(b) is unconstitutional if it prohibits evidence that could otherwise vindicate a constitutional right. The Colorado Court of Appeals affirmed, concluding that Peña-Rodriguez waived his as-applied constitutional challenge to Rule 606(b) because he "fail[ed] to sufficiently question jurors about racial bias in voir dire." Pet. App. 45a. Even if the challenge had not been waived, the court declined to "create a potentially broad constitutional exception to [Rule] 606(b) in order to vindicate a right that he failed to protect at trial." *Id.* at 57a.

One judge dissented, arguing that the failure to ask about race at voir dire should not be a waiver of Petitioner's constitutional challenge because there are "legitimate tactical considerations" against doing so and because any waiver would have to be done

"knowingly, voluntarily, and intelligently" by the defendant. *Id.* at 69a, 71a–72a. (Taubman, J., dissenting).

The Colorado Supreme Court declined to find that Peña-Rodriguez waived his constitutional challenge but nonetheless affirmed, relying on this Court's decisions in *Tanner* and *Warger*. It held that "this case law compels the conclusion that CRE 606(b) was not unconstitutional as applied to Petitioner," adding that "[a] contrary holding would ignore both the policy underlying CRE 606(b) and the unwavering Supreme Court precedent emphasizing the magnitude of that policy." *Id.* at 14a.

Three justices dissented, arguing that "where, as here, evidence comes to light that a juror specifically relied on racial bias to find the defendant guilty, CRE 606(b) must yield to the defendant's constitutional right to an impartial jury." *Id.* at 17a.

REASONS FOR DENYING THE WRIT

I. There has been no split in authority since this Court decided *Warger*.

This Court addressed the interplay between a no-impeachment rule and the Sixth Amendment just last term. In *Warger v. Shauers*, the question was whether Federal Rule of Evidence 606(b) could constitutionally exclude evidence that a juror in a car accident case had concealed during voir dire the fact that her daughter had killed a man in a car accident. 135 S. Ct. at 524. The Court rejected the constitutional challenge, holding that the principles identified in *Tanner* foreclosed "any claim that Rule 606(b) is unconstitutional in circumstances such as these." *Id.* at 529. The Court recognized that even though a no-impeachment rule removes "one means of ensuring that jurors are unbiased," juror impartiality is nonetheless "adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." *Id.* Thus, even if not all four *Tanner* factors provide protection in a particular case, this Court has concluded that the remaining factors can be sufficient to avoid constitutional infirmity.

In a footnote, *Warger* left open the possibility that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged." *Id.* at 529 n.3. However, the Court declined to reach the issue and left its holding unqualified.

The *Warger* decision added significant clarity and weight to this Court's jurisprudence regarding the

interplay between no-impeachment rules and the Sixth Amendment—an issue that the Court had not addressed in more than 25 years. That decision held that no-impeachment rules may be constitutionally applied in cases of juror bias, not just juror impairment. It also arguably rejected the narrow reading of *Tanner* adopted in the *Villar* line of cases and advocated by Petitioner here. *See* Pet. 11–15 (relying on *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009)).

The lower courts have not yet had a sufficient opportunity to apply this Court's guidance in *Warger* or to consider whether and when a case might involve "extreme" juror bias. *See* 135 S. Ct. at 529 n.3. Petitioner's asserted split of authority relies almost exclusively on pre-*Warger* cases, *see* Pet. 10–16, and there is *no* split among the post-*Warger* cases cited in the Petition. Both the Colorado Supreme Court in this case and a Pennsylvania federal district court have concluded that a racial bias exception to no-impeachment rules is not warranted. *See Smart v. Folino*, No. 3:CV-10-1447, 2015 U.S. Dist. LEXIS 43582, at *16–27 (M.D. Pa. Apr. 2, 2015) (in habeas proceeding, relying on *Warger* to reject claim that no-impeachment rule "improperly tied the hands of the state court from hearing evidence from one juror as to what [racial comment] another juror said in deliberation to demonstrate the other juror lied during voir dire"). For now, there is no confusion in the lower courts to remedy: Petitioner does not cite a single court decision that has applied footnote 3 from *Warger* to find a case of extreme juror bias.

II. This case is a poor vehicle for resolving whether the Sixth Amendment requires a general exception to no-impeachment rules for allegations of racial bias.

This case is a poor vehicle for addressing the impact of juror racial bias on no-impeachment rules because (1) the evidence indicates that a single juror's alleged racial bias had no effect on the jury's deliberations, and (2) Petitioner's counsel failed to ask the jury in voir dire about possible racial or ethnic bias and therefore likely waived his constitutional claim.

First, the circumstances of Peña-Rodriguez's conviction indicate that racial bias did not infect the jury deliberations. Neither the commission of a sex crime nor the race of the perpetrator was disputed at trial. To the contrary, the defense argued merely that this was "a case about misidentification," R. 357, attempting to neutralize the identification evidence by establishing that many Hispanic men worked and lived at the race track, *id.* at 396–97 The prosecution undercut that effort with overwhelming evidence that the assailant was Peña-Rodriguez, rather than a different Hispanic man, including the victims' identification of him as the man who had entered the bathroom. *Id.* at 386, 475–77. The alibi defense was also refuted by the victims' father, who testified that Peña-Rodriguez's truck was parked by his room when the girls reported the assault and that he saw Peña-Rodgriguez speeding away in his truck shortly afterward. *Id.* at 509–10. Given the evidence at trial and the defense's presentation of its case, one juror's alleged racial bias could not have altered the outcome.

Additionally, the jury's extensive deliberations and failure to reach a verdict on the most serious (and only felony) count shows that Petitioner's convictions were the result of careful examination of the evidence presented, rather than a product of racial bias. Thus, "[t]his is not a case ... where the verdict itself was shown to be based on the defendant's race rather than on the evidence and the law." *United States v. Benally*, 546 F.3d 1230, 1241 (10th Cir. 2008); *see also Kittle v. United States*, 65 A.3d 1144, 1156 (D.C. 2013) ("If the verdict had been affected by racial bias ... it is arguably likely that appellant would have been convicted of all counts."); *United States v. Arzola-Amaya*, 867 F.2d 1504, 1514 (5th Cir. 1989) ("The jury's ability to discern a failure of proof of guilt of some of the alleged crimes indicates a fair minded consideration of the issues[.]"); *State v. Brown*, 62 A.3d 1099, 1110 (R.I. 2013) (affirming that "allegations of juror bias did not warrant an evidentiary hearing" because "the jury returned a mix of convictions and acquittals"). Contrary to Petitioner's assertion, it is therefore unlikely that a decision by this Court in his favor would lead to a new trial.[4]

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[4] Petitioner asserts that the jury initially was "unable to reach a verdict on any of the charges," and was "deadlocked on all four charges," Pet. 4, 18; *see also* Law Professors Amicus Br. 20; NAACP Amicus Br. 10. However, this assertion is not supported by the affidavits and cannot be ascertained from the jury note stating only that the jury was "hung." R. 674. Likewise, Petitioner's assertion that "[t]he jury's difficulty in reaching a decision may have 'liberat[ed]' it to rely on non-evidentiary factors such as race" is mere speculation. Pet. 18. The more likely explanation is that the jurors took seriously their duty to carefully weigh the evidence and arrive at a considered verdict—an explanation buttressed by the jurors' decision to *acquit* Petitioner of the sole felony count.

Finally, the juror affidavits themselves do not claim that Juror 11's alleged bias persuaded or affected any juror's opinion, nor do they call the verdict into question. *See Kittle*, 65 A.3d at 1156–57 (racially biased remarks during deliberations "did not jeopardize appellant's constitutional right to an impartial jury" where the complaining juror "did not call the verdict into question" and the jury never "indicated a concern with racial bias" in its communications with the court). If the complaining jurors felt that their vote to convict Peña-Rodriguez on multiple misdemeanor counts, but acquit him of a felony count, was affected by Juror 11's bias, they likely would have said so. At the least, defense counsel could have asked this question of them.

Second, Petitioner's counsel failed to ask any questions about race or ethnicity during voir dire. The Colorado Court of Appeals held that this amounted to a waiver of his ability to challenge the alleged racial bias post-verdict. Pet. App. 45a. Although the Colorado Supreme Court disagreed, a finding of waiver comports with the great weight of case law.

"Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion); *see also Warger*, 135 S. Ct. at 528–29 ("[W]e have made clear that voir dire can be an essential means of protecting [the right to an impartial jury]."); *People v. Binkley*, 687 P.2d 480, 483 (Colo. App. 1984) ("The purpose of voir dire is to determine whether a juror is biased or prejudiced in any way."). Thus, courts have recognized that the right to challenge alleged juror bias under the Sixth Amendment can be waived,

including through failure to conduct an adequate voir dire or failing to object after voir dire reveals potential juror bias. *See, e.g.*, *Morales v. Thaler*, 714 F.3d 295, 304 (5th Cir. 2013) (the right to assert a violation of the Sixth Amendment right to an impartial jury "is subject to waiver ... [and] subject to the legitimate strategic or tactical decision-making processes of defense counsel during the course of trial"); *Robinson v. Monsanto Co.*, 758 F.2d 331, 335 (8th Cir. 1985) ("[T]he right to challenge a juror is waived by failure to object at the time the jury is empaneled if the basis for objection might have been discovered during voir dire."); *United States v. Ragland*, 375 F.2d 471, 475 (2d Cir. 1967) ("Failure to object to the composition of the jury has long been held to result in a waiver of the right of the accused to be heard by an impartial jury.").[5]

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[5] *See also United States v. Johnson*, 688 F.3d 494, 501 (8th Cir. 2012) ("[B]y failing to object to the seating of [an allegedly biased juror] during voir dire, Johnson intentional[ly] relinquish[ed] or abandon[ed] ... a known right[,] ... and thereby waived his right to challenge the impaneling of an allegedly biased juror on direct appeal.") (quotation omitted); *United States v. Diaz-Albertini*, 772 F.2d 654, 657 (10th Cir. 1985) ("[A] defendant, by accepting a jury, waives his right to object to the panel."); *United States v. Harris*, 530 F.2d 576, 579 (4th Cir. 1976) ("Where the basis for a challenge to a juror could be timely shown the failure of the defendant to object at the inception of the trial constituted a waiver of his right to challenge the composition of the jury."); *Hung Ma v. People*, 121 P.3d 205, 209 (Colo. 2005) ("A challenge for cause is waived if counsel fails to use reasonable diligence during jury selection to determine whether the grounds for such a challenge exist," and "[t]he test for reasonable diligence is whether counsel took the opportunity to adequately question a prospective juror."); *Holmes v. State*, 501 A.2d 76, 81 (Md. Ct. Spec. App. 1985) (although "the trial judge's failure to voir dire the jury panel as to racial bias was

Here, Peña-Rodriguez waived his right to challenge the validity of his guilty verdict on the basis of alleged racial bias by failing to adequately question prospective jurors during voir dire. *See* Pet. App. 50a. In voir dire, his counsel did not ask about or refer at all to race, nationality, or immigration status, despite the trial court's pre-voir dire admonition that past jurors had expressed a "dislike of people who aren't in the country legally " R. 191. Because asking such questions in this case would have given counsel the opportunity to uncover Juror 11's alleged bias, Peña-Rodriguez's failure to do so waived his ability to now challenge the verdict based on that bias.

Peña-Rodriguez argues that "asking direct questions about racial bias is usually ineffective" because "jurors are unlikely to self-identify as racially prejudiced or to make racially biased statements during voir dire." Pet. 24. But this Court's precedent recognizes that voir dire questions, even on the sensitive subject of race, can be effective—indeed, the Court *requires* direct voir dire inquiry into racial bias under certain circumstances. *Rosales-Lopez*, 451 U.S. at 185–86, 190 (plurality opinion);[6] *see also Ham v. South Carolina*, 409 U.S. 524, 526–27 (1973); *Aldridge v. United States*, 283 U.S. 308, 310 (1931) (reversing black defendant's conviction for murder of a white policeman because trial court refused to ask prospective jurors whether they entertained any racial

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error," defendant "waived that error" based on his "failure to object ... [and] his expressing satisfaction with the jury impaneled").

[6] Two additional Justices in *Rosales-Lopez* generally agreed with the four-Justice plurality, but would have granted the trial judge broader discretion. 451 U.S. at 194 (Rehnquist, J., concurring).

prejudice). Petitioner himself recognizes that "a trial court must question prospective jurors specifically about racial prejudice when there is 'a significant likelihood that racial prejudice might infect'" a trial. Pet. 28 (quoting *Ristaino v. Ross*, 424 U.S. 589, 598 (1976)).

And, as the Colorado Court of Appeals noted below, there are various ways to "conduct[] meaningful voir dire as to race" without relying solely on 'direct questions about the jurors' racial bias. Pet. App. 51a. (citing sources and listing "appropriate lines of inquiry," including "past experiences with racism" and "positive or negative interactions with individuals of a particular race").

Because Peña-Rodriguez entirely failed to use the chief mechanism for discovering and eliminating juror bias—voir dire—he has waived his ability to claim that the Colorado courts' application of Rule 606(b) violated his Sixth Amendment rights.

III. The Colorado Supreme Court correctly concluded that excluding juror testimony in this case did not violate the Sixth Amendment.

Petitioner argues that the Colorado Supreme Court erred in not creating a constitutional exception to Rule 606(b) for racial bias. To the contrary, the court correctly applied *Tanner* and *Warger* in refusing to create such a broad exception.

First, the factors that this court identified in *Tanner* can appropriately be applied in cases of alleged racial bias. As this Court held in *Warger*, not every factor need be present in every case, 135 S. Ct. at 529, and

here several factors counsel in favor of declining to graft exceptions to the no-impeachment rule. The ability to ask voir dire questions that elicit jurors' views on race, as discussed above, is a key protection for defendants who avail themselves of it. Similarly, jurors may report inappropriate comments or behavior by their fellow jurors prior to rendering their verdict. *See, e.g.*, *Lee v. United States*, 454 A.2d 770, 774 (D.C. 1982) (during deliberations, jurors sent judge a note suggesting that foreperson was incapacitated) (cited in *Tanner*, 483 U.S. at 127); *see also Black v. Waterman*, 83 P.3d 1130, 1137 (Colo. App. 2003) (allowing introduction of affidavit alleging that a juror privately admitted bias to a fellow juror during voir dire). Even the ability to observe the jury could potentially provide relevant evidence of racial bias—such as if racially biased comments are made outside the jury room. *See Tanner*, 483 U.S. at 127 (citing *United States v. Provenzano*, 620 F.2d 985 (3d Cir. 1980) (federal marshal observed improper juror activity outside of normal court hours)).

Second, the Colorado Supreme Court properly rejected Petitioner's argument that racial bias "stand[s] apart from other forms of partiality" and must be treated as "the extreme case" that "requires a constitutional exception." Pet. 21, 24. There is no question that racial bias is reprehensible and should never be the basis for a verdict. But as the Colorado Supreme Court noted, although "neither *Tanner* nor *Warger* involved the exact issue of racial bias," this Court's jurisprudence does not warrant creating "a dividing line between different *types* of juror bias or misconduct, whereby one form of partiality would implicate a party's Sixth Amendment right while

another would not." Pet. App. 14a–15a (emphasis in original).[7] Nothing in *Warger* supports Petitioner's extreme position. And even the decision in *Villar*, on which Petitioner relies heavily, did not go as far as suggesting that a no-impeachment rule must yield whenever there is an allegation of racial bias. Instead, that court "emphasize[d] that not every stray or isolated off-base statement made during deliberations requires a hearing at which jury testimony is taken," and limited its holding to "those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury." 586 F.3d at 87

Third, in addition to problems with protecting the privacy of deliberations and avoiding jury harassment that this Court has identified, *see Warger*, 135 S. Ct. at 528, courts would face a number of difficult questions under Petitioner's claimed exception, and the result would be a substantial erosion of the longstanding no-impeachment rule. These include questions of proof, such as whether complaining jurors are to give live testimony, whether they can be cross-examined, what exactly must be proven to justify a new trial, and what the appropriate standard of proof would be. Petitioner's requested holding would also raise questions about whether and how the opposing party would be able to

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[7] In his state court appeal, Petitioner advocated for exceptions to the no-impeachment rule for many forms of bias, stating that "[t]he term prejudice will be used interchangeably for the phrase 'evidence of racial, ethnic, religious or gender bias'" and that "while religious bias is not at issue in this case, all recognizable classes under the Equal Protection claims (such as religion) should be part of this Court's analysis." *People v. Peña-Rodriguez*, 11CA0034, Op. Br., p. 30 n.5.

rebut the evidence. For example, could the opposing party subpoena other jurors to test the claim of biased statements and whether those statements influenced deliberations? Could character witnesses or other external evidence be admitted to show that the juror in question is not in fact biased? These and other problems highlight why Petitioner's requested holding—which would open the door to effectively invalidating no-impeachment rules in cases of claimed juror bias—was properly rejected and is not constitutionally required.

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This Court noted in *Tanner* that although "[t]here is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior[,] ... [i]t is not at all clear ... that the jury system could survive such efforts to perfect it." 483 U.S. at 120. *Tanner* and *Warger* struck the proper balance, and the Colorado Supreme Court correctly concluded that balance should be maintained even to exclude the proffered evidence of racial bias here.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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